SJR 32 Subcommittee on Medical Liability Insurance

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58th Montana Legislature

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GEORGE GOLIE--Chair
ROY BROWN
KATHLEEN GALVIN-HALCRO
DON ROBERTS

COMMITTEE STAFF
JOHN MACMASTER, Staff Attorney
DAWN FIELD, Secretary
DAVE BOHYER, Research Director

MINUTES

January 15, 2004

Helena College of Technology - A.M.
Room 102, State Capitol - P.M.
Helena, Montana

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

COMMITTEE MEMBERS PRESENT

REP. GEORGE GOLIE, Chair
SEN. DUANE GRIMES, Vice Chair

SEN. JOHN COBB

REP. ROY BROWN
REP. KATHLEEN GALVIN-HALCRO
REP. DON ROBERTS

COMMITTEE MEMBERS EXCUSED

SEN. BRENT CROMLEY
SEN. DEBBIE SHEA

STAFF PRESENT

DAVE BOHYER, Research Director
JOHN MACMASTER, Staff Attorney
DAWN FIELD, Secretary

VISITORS' LIST & AGENDA

Visitors' list, Attachment #1.
Agenda, Attachment #2.

COMMITTEE ACTION

- approved the minutes of the November 16 and 17 meetings, as amended.

CALL TO ORDER AND ROLL CALL

REP. GOLIE called the meeting to order at 8:14 a.m., introduced the Subcommittee members, and welcomed interested persons and presenters. Roll call was taken, Senators Cromley and Shea were excused.

Pat Melby, Montana Medical Association, asked to have page 13 of the November 17, 2003, meeting minutes amended to state that he and Gerald Neely were representatives of the Montana Medical Association (MMA), not the Montana Hospital Association (MHA). The minutes from the November 16 and 17, 2003, meeting were approved as amended by a unanimous voice vote.

REP. GOLIE gave a brief history of the SJR 32 Medical Malpractice Liability Insurance study and outlined the Subcommittee's activity up to this point.

UNDERWRITING MEDICAL LIABILITY INSURANCE

Mark Crawshaw Ph.D, Madison Consulting Group, Nonaligned Actuary/Underwriter, appeared before the Subcommittee via video conference and provided background information on his education, professional qualifications, and consulting group. He then presented a Power Point presentation: *MEDICAL PROFESSIONAL LIABILITY RATEMAKING* (EXHIBIT #1) which included:

- examples of premium calculations;
- the definition of "exposure" and how it is measured;
- the definition of a "rate" and discussed factors/costs that influence rates;
- how an actuarial rate indication is determined;
- a review of industry countrywide operating results;
- a method to estimate claim costs;
- a method to estimate underwriting profit;
- how an insurance premium is determined for a hospital; and
- market issues.

SUBCOMMITTEE QUESTIONS/DISCUSSION

REP. ROBERTS asked Mr. Crawshaw, regarding the blending of different markets, how or if they were "weighted" by the number of hospitals in a particular market. He also asked if the Montana market is treated as a market unto itself or blended into a regional market. Mr. Crawshaw said the goal would be to have Montana hospitals paying premiums based on Montana history/data but including some outside data may be necessary since Montana has so few hospitals and not as much data to draw from. Insurance companies usually consider more data than just state data, even in the larger markets. But those companies would also try to make adjustments within the rates for a particular state's data and history.

REP. ROBERTS asked if insurance companies use a formula to determine the amount of money they must have in reserve for settlements. Mr. Crawshaw said the total cost of defending a claim is looked at, not just the actual settlement amount.

SEN. GRIMES asked Mr. Crawshaw to explain the factors considered in determining a facility's rate. Mr. Crawshaw said the overall claims history of each facility is examined and projections are made for what that facility's costs will be in the future year, based on its overall claims history. The next step is to decide how to divide the costs up between the hospitals/group members. One way to do it is just to figure out an individual member's exposure. If all the members' exposure is all the same, then divide equally. If the exposure is not equal and it rarely is, then relationships based on bigger picture (countrywide data for example) must be used to determine the risk factors. The relative size of the hospital is measured and the rate is distributed in proportion to this.

REP. GALVIN-HALCRO asked Mr. Crawshaw if she understood him to say that the more functions/services a facility offers, the higher the risk ratio would be for that facility. Mr. Crawshaw said that was true but added that cost of claims experience can also have a great amount of influence on the risk ratio. A lot of experience provides a reliable statistical basis for adjusting a rate. Without this statistical evidence/basis (as is usually the case with a smaller hospital) it is more difficult to make these adjustments.

REP. GALVIN-HALCRO asked Mr. Crawshaw if she understood him to say that depending on a doctor's specialty, risk factors differ from practice to practice. Mr. Crawshaw said that is true: an obstetrician for example, would have a higher risk ratio than a family practitioner, resulting in a higher rate for the obstetrician.

REP. GOLIE asked if it would it be better for facilities to offer just one service in order to get a better rate. Mr. Crawshaw said no, that from an insurance point of view it is the statistical average that influences rates.

Dave Bohyer, Research Director, Legislative Services Division (LSD), referred to page 9 of EXHIBIT #1 and asked Mr. Crawshaw how many of the different elements are actually used in determining exposure. Mr. Crawshaw said it would depend on the company. The standard that hospitals use is based on two categories: acute beds and outpatient/emergency visits. The hospital industry has moved away from the acute care beds and towards outpatient visits. This has affected the ratios which in turn, affects the rates, and results in a premium adjustment. This shift has been particularly prevalent in Montana.

REP. ROBERTS asked Mr. Crawshaw if he thought it likely that as doctors increase their malpractice coverage, the size of claims/settlements would increase as well. Mr. Crawshaw said he thought that was very possible.

REP. GOLIE asked Mr. Crawshaw if it would be possible for him to attend the afternoon meeting session. Mr. Crawshaw said he would be in attendance.

Mona Jamison, Esquire, The Doctor's Company, introduced **Dr. Richard Anderson, Chairman & CEO, The Doctor's Company (TDC),** to the Subcommittee by providing background information regarding Dr. Anderson (EXHIBIT #2 - Dr. Anderson's educational and

professional credentials) and a fact sheet (EXHIBIT #3 - bulleted list addressing the medical malpractice insurance crisis and information about The Doctor's Company and about Dr. Anderson).

Dr. Anderson addressed the Subcommittee via video conference and submitted a printed copy of his testimony (EXHIBIT #4). Dr. Anderson's testimony was his response to three questions submitted to him by the SJR 32 Subcommittee, which were as follows:

1) How does The Doctor's Company determine premium rates for the doctors that it insures?
2) What effect, if any, does a paid claim have on an individual doctor's future medical liability premium or on the premiums of other doctors?
3) What factors have caused or are causing rate increases in medical liability premiums?

Dr. Anderson discussed The Doctor's Company response to each question in his testimony, as contained in EXHIBIT #4. Additionally, Dr. Anderson referred to a primer by Dr. James Hurley (*CAUSES OF THE MEDICAL LIABILITY INSURANCE CRISIS* - EXHIBIT #5) when he addressed the first question and to a bar graph (*TDC Manual Rates as of 1/1/04* - EXHIBIT #6) in his discussion of the third question.

REP. ROBERTS asked if a "no fault" medical malpractice insurance approach has ever been considered as an option in Montana. Dr. Anderson said the no fault insurance option is very attractive. He said he is familiar with a number of proposals for no fault medical malpractice insurance but that two concerns came to mind:

- A no fault system runs the risk of becoming an "entitlement" system. Cost estimates done by independent observers such as the Harvard Medical Practice Study predict that the no fault system would equal or exceed costs under the current system.
- American society's propensity for litigation would limit the effectiveness of this approach.

SEN. GRIMES asked Dr. Anderson to discuss other tort reform measures that could be effective in Montana. Dr. Anderson said in general, the three most important reforms that work extremely well as a package were:

- A $250,000 no exceptions cap on non-economic damages (Montana has this in place).
- A mandatory collateral source: if the patient has already had their healthcare paid for by health insurance, they couldn't collect the cost of their healthcare again in the medical malpractice suit. In an era of rapidly rising healthcare costs, this is a very valuable reform. (Montana has this in place.)
- A mandatory periodic payment statute which would mandate that large judgments be paid over the time for which the judgment was intended. (Montana has this in place.)

Dr. Anderson also discussed a sliding scale contingency fee which has the major advantage of allowing the injured patient to receive a larger portion of their settlement, rather than their attorney.

Dr. Anderson said having all four measures would make a very strong tort reform package for Montana.

SEN. GRIMES asked Dr. Anderson to comment on the frequent criticism heard concerning the investment portfolios of companies that underwrite medical malpractice premiums. Dr.

Anderson said this issue comes up repetitively in this debate and, in his opinion, is the least pertinent. Dr. Anderson went on to say:

- In the 1990s when interest rates were high and the stock market was gaining, mutual insurance companies, like TDC, used the profits from investments to subsidize the costs of premiums.
- By using these investments profits, TDC was able to sell medical malpractice insurance to doctors for less than cost. Even though the doctors were receiving insurance for less than cost, TDC still did well because the investment profits were used to subsidize the sale of insurance.
- Insurance companies' investments are highly regulated - the average insurance company has less than 10% of its investment portfolio in stocks.
- Prevailing interest rates are of much more importance to the insurance company. Average interest rates in the 1990s were in the range of 7-10% and today range from
- 3-5%. This difference in interest rates results in a large difference in produced income.
- As investment profits have declined due to the stock market and interest rates, the amount of investment income available for subsidizing premiums has decreased also and is not available to the extent it once was. This results in the premium holders having to pay a larger portion of the actual cost of the insurance, hence the significant premium increase.

Dr. Anderson emphasized that the increase in premiums was not due to insurance company mismanagement.

REP. ROBERTS asked Dr. Anderson to comment on anecdotal information of concern to him: that when a large settlement occurs, in many instances the family associated with the settlement spends the settlement within 5 years and the patient becomes the responsibility of the state. Dr. Anderson said he knew of such occurrences and said one of the fundamental benefits of the periodic payment statute would be the requirement that the settlement be paid out over the lifetime of its intended use. This would guarantee that the settlement money would be available for its intended purpose of patient care.

REP. ROBERTS stated that many doctors and facilities are reluctant to hold routine discussions on issues such as morbidity, mortality, chart review, quality care, etc., for fear of encouraging liability issues. Dr. Anderson agreed this was a very real and serious issue. He said he thought this type of review was a very important tool to use to improve the quality of care and to learn from the different cases but because these kinds of conferences can become "discovery", the very efforts to improve care could actually become part of an allegation of negligence.

REP. BROWN asked Dr. Anderson to discuss "expert witness" as a potential tort reform measure. Dr. Anderson said he believed this was a common sense reform measure and that by setting more stringent standards for expert testimony, the quality of court proceedings would improve a great deal.

SEN. GRIMES referenced previous testimony from a rural Montana obstetrician given at the November meeting who reported that his malpractice premiums had increased from $105,000 annually to about $260,000, in the span of about a year and a half. SEN. GRIMES asked Dr. Anderson to explain the rationale for such a significant increase. Dr. Anderson said he was not familiar with this exact situation, but that he was aware of similar instances in Montana and

throughout the country. Dr. Anderson explained that high risk specialists (the highest risk practices are neurosurgeons and obstetricians) constantly face the possibility of adverse outcomes. The vast majority of adverse outcome situations result in a malpractice claim, irrespective of whether medical negligence had anything to do with the injury. In that context, it becomes a question of mathematics: with such a small number of high risk specialists practicing in Montana, even just one million-dollar-plus claim every year or two means that a lot of premium must be collected to pay those claims.

SEN. GRIMES asked how these specialists could minimize their risk or limit their exposure. Dr. Anderson said TDC continually reviews standard of care guidelines, analyzes claims experience, and identifies risks and that TDC communicates all of this information to the doctors.

REP. GOLIE asked if The Doctor's Company overhead costs, in relation to premium rates, had remained stable over the last few years. Dr. Anderson said the overhead, as a percentage of premium, had come down considerably. He reported that in 2003, it was approximately 18% and in prior years it had been approximately 25%.

REP. GOLIE asked Dr. Anderson if he was aware of the Montana Medical Legal Panel (MMLP), if he thought it was an effective tool in identifying claims as being with or without merit, and if he had any suggestions for improvement. Dr. Anderson said he was familiar with the MMLP and that while it was admirable, it was not producing the desired results. Dr. Anderson said that as long as the MMLP's findings were neither binding nor admissible in court, it could not have a significant impact.

REP. GOLIE asked Dr. Anderson to explain his earlier statement that parts of the Montana 1995 tort reform needed clarification by the Supreme Court. Dr. Anderson explained that the $250,000 cap on non economic damages has reduced costs in the state but that there is a concern that the Supreme Court has the power to find such reform unconstitutional. Consequently, some cases are quelled for fear of producing a test case that would go to the Supreme Court and result in upending the legislation entirely. Until that issue is settled firmly, either through a Supreme Court ruling or a constitutional amendment, there will be at least some degree of uncertainty regarding the future enforcement of it. There could be additional benefit derived if insurers could be certain that it will be in place for some time.

REP. GOLIE asked if legislation enacting a sliding scale contingency fee tort reform would result in a significant drop in premium rates. Dr. Anderson said a mandatory collateral source offset would create a more significant impact and while it would be difficult to give an absolute number, he guessed this type of tort reform would result in an average reduction of about 10-15% a year. Dr. Anderson added that the average patient receives only 28 cents of every settlement dollar, with the remainder going to the attorney.

REP. GOLIE asked if increasing malpractice coverage affects claims amounts. Dr. Anderson said ultimately a doctor buys insurance to protect their assets and to provide a legal defense in the event of a challenge. Dr. Anderson said as a general rule of thumb, a $1-3 million policy is adequate and that it was very rare to have an instance where a physician is asked to personally pay a judgment that exceeds his policy limits. If the doctor has a $1 million dollar policy and there is a claim filed, it will likely be a $1 million dollar claim.

REP. GOLIE asked how many $1 million-plus claims have been filed in Montana in the last 8 years. Dr. Anderson said for TDC alone, the average was about one $1 million dollar claim per year. He said, in considering the statewide data from all insurers in Montana, he would guess the average would be about two or three claims filed per year.

REP. GOLIE asked how The Doctor's Company was trying to address this. Dr. Anderson said TDC has a very active risk management program: claims are analyzed by expert panels and TDC disseminates the findings to all of its policy holders. Dr. Anderson said it is in the best interest of TDC and its doctors to improve patient outcomes.

REP. GOLIE said after four meetings, it was his understanding that most malpractice claims are settled out of court, and asked Dr. Anderson if there were any measures that could be taken to decrease the costs or size of the settlements. Dr. Anderson gave the following explanation:

- For every 100 claims filed against doctors insured by TDC, 80 will be closed with no settlement paid.
- The remaining 20 claims will be found to have merit and result in a paid claim, either through settling out of court (13-15 claims) or by a court judgment (5-7 claims).
- Of the 5-7 claims that end up in court, TDC will receive a favorable ruling for 80% of them.

Dr. Anderson said the court verdicts really define what the limits will be and until there is some control gained in that area, it would continue to be a problem.

REP. ROBERTS asked Dr. Anderson if he is finding that ,as a result of malpractice claims, there is a restriction of interest in introducing new technology/medical devices in the United States. Dr. Anderson said this is a very serious issue and that medicine as an industry is in a situation where innovation is being penalized because of fear of litigation. Dr. Anderson went on to comment that many times it is an experimental procedure that saves a life or at least furthers knowledge. And, because it is experimental, the outcome is unknown and can result in an adverse outcome. Poor outcomes frequently end in a claim being filed and so it is very difficult to insure experimental procedures because the outcome cannot be predicted.

SEN. COBB asked Dr. Anderson to elaborate on his earlier comment that Montana should examine some of the medical malpractice laws enacted by California. Dr. Anderson said California law contains two areas that he thought would benefit Montana:

- contingency fee limitations and
- mandatory collateral source offset, which would eliminate what amounts to "double dipping".

SEN. COBB said it takes about three and a half years to settle a case and asked Dr. Anderson if he could recommend legislative measures that would speed up the process. Dr. Anderson listed two recommendations:

- Tort reform, which would reduce the amount of time needed to settle a case because when the "litigation lottery" is eliminated and the system is defined more clearly, it is much easier to agree on what the economic damages are and what the actual cost of care for the patient is: lost wages, future health care costs, actual damages, etc.
- Establishing measures for disciplining attorneys who bring forth nonmeritorious cases would reduce the number of claims filed.

SEN. COBB said Montana has only between 500 and 600 physicians insured by TDC practicing and asked if tort reform will have an impact on such a small number or if the doctors would just end up sharing the expense of these claims by paying higher premiums. Dr. Anderson said it was important to understand that premiums in Montana are already relatively low, comparatively speaking, because of the tort reform measures already put in place.

Mr. Bohyer said Dr. Anderson had mentioned earlier that TDC's overhead, as a percentage of its premium revenue, was declining over the last several years. Mr. Bohyer pointed out that the scenario can occur if overhead is increasing at a very rapid rate but premiums are increasing at an even faster rate. Mr. Bohyer asked Dr. Anderson to provide the Subcommittee with the rate of change in the nominal dollar amount of TDC overhead costs and the nominal amount of TDC total premiums over the same period of time. Dr. Anderson said he would provide that information. Dr. Anderson said the point made by Mr. Bohyer was correct but that particularly for the last year or two, TDC has made a major effort to reduce absolute expenses and has done so somewhere between 5 and 10 million dollars, in addition to a proportionate decrease in the premium rates.

Mr. Bohyer said he recalled Dr. Anderson saying that it was very important for the insurers to have the non economic damage cap approved as constitutionally sound and yet TDC and other companies, since Montana enacted this cap in 1995, has not brought it to court to get that verification. Mr. Bohyer asked why none of the insurers have done that. Dr. Anderson said the concern is that, based on recent decisions made by the Montana Supreme Court, there is a significant likelihood that the statute would be overturned. Mr. Bohyer asked Dr. Anderson if it was his opinion that substantive changes had to be either a change in the Court or a change in the Constitution and would not be a result of legislative action. Dr. Anderson said that was correct.

Mr. Bohyer said non economic damages appear to be a significant driver to the costs of claims. He asked Dr. Anderson if in the cases that TDC has settled, what the average amount of non economic damages paid has been over the last 8 years. Dr. Anderson said he couldn't give an accurate figure for non economic damages overall for the state of Montana or even overall for TDC because the majority of claims that pay an indemnity are a negotiated settlement. He said there is nothing in these settlements which breaks out economic versus non economic damages and that makes it impossible to make an accurate calculation.

Mr. Bohyer asked in the cases that TDC has litigated, what is the average amount of non economic damages awarded. Dr. Anderson said he did not have the information immediately available but would find out and provide it to the Subcommittee. Dr. Anderson said he did know that the average loss costs resulting from jury verdicts in states like Montana and California are about one third less than comparable states and the reason for this is directly attributable to the tort reform measures put in place.

Mr. Bohyer referred to Dr. Anderson's testimony that TDC pays about one $1 million claim per year in Montana. He asked if those claims were typically settlements or jury awards. Dr. Anderson said he would provide that information to the Subcommittee but that he did not have that information available to him. He said he would guess that majority of the claims were jury awards.

REP. GOLIE thanked Dr. Anderson for his time and his candid testimony and said the information was very worthwhile. Dr. Anderson said he genuinely appreciated the opportunity to appear before the Subcommittee.

Leona Egeland Siadek, Vice President of Governmental Relations appeared with Dr. Anderson via video conference and stated she was available for questioning, if needed (EXHIBIT #7).

REP. GOLIE asked Mr. Crawshaw to return for additional questioning by the Subcommittee.

Dr. Louis Kattine. Missoula Surgeon's Association, Missoula, said his practice of six surgeons has seen 50% increases in premiums each of the last two years, whereas in each of the last 8 years, the surgeons didn't have any substantial increase in premiums. Dr. Kattine referred to Dr. Anderson's statement that the number of meritless claims is a big portion of the expenditure and wondered if by reducing the number of meritless claims, if premiums could be substantially reduced. Dr. Kattine also discussed the rising costs of having to appear before the Montana Medical Legal Panel and said according to his malpractice carrier, the cost is about $20,000. He asked Mr. Crawshaw if decreasing the number of cases appearing before the Panel would help decrease premiums. Mr. Crawshaw said if it could be done in a static environment it would reduce the overall cost by 15-20 percent but also said if a system was put in that cuts out those claims, it would dampen the appetite for bringing claims, even those with merit and would completely change the system.

Dr. Kattine asked if there was a cheaper way to do it than the Medical Legal Panel. Mr. Crawshaw said he did not know.

The SJR 32 Subcommittee recessed for lunch and reconvened at 1:15 p.m. in Room 137 of the State Capitol.

Martin J. Oslowski, President & CEO, Utah Medical Insurance Association(UMIA), presented detailed information on the UMIA and its history of business practices in Montana (EXHIBIT #8). Mr. Oslowski discussed:

- organizational aspects of UMIA as a business;
- detailed policy holder information;
- a list of UMIA Montana insured hospitals;
- policy holder information comparing Montana, Idaho, Wyoming, Nevada, and Utah;
- Montana direct earned premium information for 1991-2003;
- Montana incurred loss information for 1991-2003;
- Montana frequency of claims evaluation by policy holder;
- Montana loss ratio information for 1991-2003;
- Montana average paid claim analysis for 1991-2003;
- surplus position information for 1991-2003, excluding 1994;
- a risk classification chart;
- a direct comparison of rates charged for Montana and Utah;
- State of Montana Schedule T for UMIA, St. Paul, OHIC, PHICO, Physician Insurance Exchange, Western Professional Insurance Company, etc.,
- factors affecting medical malpractice insurance; and
- a general comparison of tort reform laws in California, Montana, and Utah.

COMMITTEE QUESTIONS/DISCUSSION

SEN. COBB, in discussing Montana Average Calendar Year Average Paid Claim data (EXHIBIT #8), asked Mr. Oslowski if the "average paid claims" included cases that ended up in court. Mr. Oslowski said the majority of the cases were settled out of court.

Mr. Oslowski asked Mr. Riley to discuss hedonic damages. Mr. Riley said the definition of hedonic damages are damages for the unusual pleasures and enjoyments that one is deprived of beyond the normal scope of living: the things that give one real joy and pleasure. Hedonic damages are an added damage that only a few states allow. Mr. Oslowski discussed, as an example, if he loved to play golf and was deprived of the ability to play golf, then under hedonic damages, he would be allowed to collect extra money above non economic damages. Mr. Oslowski noted that the Montana Supreme Court is currently reviewing a case involving hedonic damages and said if the Court recognizes hedonic damages, it will have dire consequences.

REP. GOLIE asked if those damages are separated away from non economic damages. Mr. Riley said yes.

REP. ROBERTS asked Mr. Oslowski to explain what happens when a claims made insurance company goes bankrupt. Mr. Oslowski said if the bankrupt company is licensed to sell insurance in Montana, they mandatorily belong to the Montana Guarantee Association and the Guarantee Association will pick up some of the short falls. If the company is not licensed for business in Montana, the insureds are out of luck.

SEN. GRIMES asked about surplus position information as listed in EXHIBIT #8 and asked if "surplus" and "reserves" meant the same thing. Mr. Oslowski said surplus has nothing to do with reserves, that surplus is uncommitted capital and is a company's margin for error. It is protection for the insureds and the public, is an indication of a company's solvency, and a company is required to maintain surplus at certain levels.

REP. GOLIE asked Mr. Oslowski why there were no premium increases for the period of 1990 - 1999. Mr. Oslowski said it was due to a combination of factors:

- investment returns were high during that time;
- there were fewer claims made and the claim amounts were less; and
- case law was more favorable.

Mr. Oslowski said UMIA didn't want to overcharge and made the decision to keep rates at a level that was necessary to cover the losses.

REP. GOLIE said in looking at the rate comparison between Utah and Montana, it appeared that Utah's rates were historically higher and asked if that really was the case. Mr. Oslowski said that was true. The rates were based on the two states' data and the data was justified by independent actuaries.

REP. GOLIE asked Mr. Oslowski to explain why the Utah and Montana physicians are paying the same rates but have drastically different claim amounts. Mr. Oslowski said the difference is attributable to the fact that Utah has a bigger base on which to spread the cost: for every one Montana physician insured by UMIA, there are three Utah doctors insured by UMIA.

REP. GOLIE asked Mr. Oslowski to comment on why he thought there was such a difference in the average claim paid between Montana and Utah. Mr. Oslowski said case law is the primary reason. In Montana, even if a claim is taken to the Montana Medical Legal Panel and won, a lawsuit can be filed anyway. Mr. Oslowski said he has suggested to Mr. Melby that something should be done at the Panel level to define an adverse ruling to mean that liability is not clear but there is enough evidence to get by a motion for summary judgment.

REP. GOLIE asked if Utah has the equivalent of a Medical Legal Panel. Mr. Oslowski said Utah has a pre-litigation screening panel. He said it is successful in reducing some of the number of claims that continue because the patient gets to confront the doctor and hear the doctor's side.

REP. GOLIE asked Mr. Oslowski to comment if he thought the Montana Medical Legal Panel was a good system. Mr. Oslowski said the Panel was beneficial but it is what happens after the Panel that concerns him. He gave the example of how loss of chance doctrine is used in Utah versus Montana:

- In Utah, the loss of chance doctrine is more probable than not, meaning that if a doctor delays a diagnosis of cancer (for example) for several months and the testimony is that it is more probable than not that the delay did not affect the end result, the case can be won on causation - the doctor may have delayed the diagnosis but it did not harm the patient.
- In Montana, loss of chance means that if the patient has even a 1% chance of having a better result, they are entitled to collect 100% of the damages. It can't be defended on causation so the doctor's conduct has to be absolutely perfect in order to risk taking the case to trial, losing it, and after losing it, getting sued for third party bad faith by the doctor because UMIA should have known it was going to lose and should have paid the money earlier.

REP. GOLIE asked Mr. Oslowski to confirm that most UMIA claims are settled out of court. Mr. Oslowski said that was true. REP. GOLIE asked how many million-dollar claims UMIA has had filed against it in the last five years or so. Mr. Oslowski said UMIA has paid four million-dollar-plus claims last year. He also said of 25 paid cases last year, 18 were claims over $100,000.

REP. GOLIE asked Mr. Oslowski if, when he referred to $1 million policy limits, that amount was the maximum amount a doctor could pay on a claim. Mr. Oslowski said that was correct and that about 96% of UMIA-insured physicians carry $1 million of coverage.

REP. GOLIE asked how many doctors carried a $2 million policy. Mr. Oslowski said very few could afford the premiums for $2 million coverage. REP. GOLIE asked if a physician has $1 million of coverage, pays a $1 million claim, if that it is usually the end of the litigation. Mr. Oslowski said that used to be the case. UMIA would get a signed release and be released from all future liability. He said he believed the Supreme Court just ruled that payments may not be predicated on policy limits and so this may no longer be the case. If an attorney won't sign a release to release the doctor from future liability, the case stays open and can keep coming back for more. REP. GOLIE asked if policy limits are part of the problem. Mr. Oslowski said the higher the policy limit, the more the doctor will pay out. Mr. Oslowski said almost every hospital in the state has a requirement that a physician carry at least $1 million in coverage to protect the hospital so the issue is not the limits.

SEN. GRIMES referred to earlier discussion of the rural Montana OB/GYN whose rates drastically increased in a very short time and asked Mr. Oslowski to give his opinion on the cause of the increase. Mr. Oslowski said it was likely related to the doctor's personal loss experience.

SEN. GRIMES asked if the four different million-dollar-plus Montana claims paid by UMIA were spread over all of UMIA's portfolio or just by the Montana doctors insured by UMIA. Mr. Oslowski said the losses would be paid by the Montana doctors.

SEN. GRIMES asked Mr. Oslowski to compare tort reform items from EXHIBIT #3 and the tort reforms in EXHIBIT #8. Mr. Oslowski said he thought about 2/3 of the states have MICRA-like reforms and only about 1/3 of the states have no reform. He said he was trying to demonstrate what separates Utah and Montana, who both have MICRA-like reforms, with differentiation and what makes it more difficult and costly to handle claims in Montana.

SEN. GRIMES asked if it was difficult to quantify how one particular form over another would impact the state. Mr. Oslowski said actuaries try to do it but that it is difficult to determine.

SEN. GRIMES asked how long UMIA would continue to do business in Montana. Mr. Oslowski said UMIA was committed to the Montana market and would remain in Montana as long as it could charge an adequate rate.

REP. GOLIE said the sliding scale contingency fee is a tort reform measure that Montana does not have. He asked if it would have a significant effect on Montana premium rates. Mr. Oslowski said it would provide no relief to the physicians but would put more money in the pockets of the injured plaintiff.

Mr. Bohyer pointed out the dramatic increases in claims paid, which increased from $9500 to $252,000 before UMIA finally changed rates (Montana Average Calendar Year Average Paid Claim, EXHIBIT #8). He asked if UMIA should have implemented gradual rate increases much sooner, which would have mitigated the large premium increases being experienced by Montana physicians. Mr. Oslowski said UMIA didn't want to make a "knee jerk" reaction to the increases and wanted to make sure the trends were real before increasing premium rates. He said UMIA was not in the business to make a profit but in the business to keep the premium as low as possible for the physicians.

REP. ROBERTS asked if expert witness qualifications for malpractice trials would be of help in the conduct of a malpractice trial. Mr. Oslowski said he didn't think it would have a major impact.

REP. GOLIE asked if, in looking forward and trying to predict what the trend will be, if Mr. Oslowski thought the current situation would level off, as it has done in the past. Mr. Oslowski said without changes in the case law, he doubted it would level off.

REP. GOLIE asked if UMIA-insured doctors participate in risk management training. Mr. Oslowski said risk management has always been a high priority for UMIA and said there are several programs offered:

- all-day programs that teach physicians how to more effectively communicate with their patients;
- sessions that discuss medical issues, such as informed consent and record keeping; and
- specialty sessions for specialty practices.

Mr. Oslowski said while he is very proud of this training, risk management does not control case law.

REP. ROBERTS asked if practitioners are changing their practices in accordance with what they are confronted with in terms of liability. Mr. Oslowski said yes, that physicians are retiring earlier, changing their practice profile, and giving up high risk services.

REP. GOLIE said at the November meeting, there was a lot of testimony from doctors and facilities on the increases in premiums but that there was little increase in revenues to help pay for the increases. He asked Mr. Olsowski if he thought that was a factor. Mr. Oslowski said without question, that was a factor.

PATIENT TESTIMONY

Craig Daue, Esquire, Missoula, introduced two clients who have been through the medical malpractice litigation experience to testify before the Subcommittee in order to give some perspective from the client's side. Mr. Daue gave a brief procedural history of each case (EXHIBIT #9).

Tamara Kittelson-Aldred testified to the Subcommittee of her experience as the mother of a medical malpractice victim who lost her life (EXHIBIT #10).

Deborah Brennon, testified to the Subcommittee of her experience as the sister of a medical malpractice victim who lost his life (EXHIBIT #11).

REP. GOLIE, on behalf of the Subcommittee, extended condolences to both women for their losses and thanked them for their testimony.

Mr. Daue said he has represented both defendants and plaintiffs and has seen abuses of the system occur on both sides. He urged the Subcommittee to be very cautious in its recommendations so that it does not limit or discourage people such as Ms. Kittlelson-Aldred and Ms. Brennon from bringing valid claims forward. He said, based on his experience as both a defense and plaintiff attorney, it is not the conduct of the defendants themselves nor the lawyer, but the insurance companies who refuse to investigate these claims and promptly and fairly get them paid.

REP. GOLIE asked Mr. Daue how many claimants request his firm's services, versus how many cases the firm actually accepts. Mr. Daue said two years ago, his firm kept track of the number of cases it was asked to take and the number of cases it accepted. During that 12-month period, there were 28.7 requests for representation for every one case the firm agreed to take.

REP. GOLIE asked of the cases that the firm did accept, how many ended in a positive judgment. Mr. Daue said there were very few malpractice cases actually tried in Montana and that well over 99% of the cases settle at mediation. He said approximately 95% of his firm's cases are positively settled for its clients.

REP. GOLIE asked Mr. Daue to comment on the earlier statement made that plaintiff attorneys will take as many cases as they can because they will only win 2 out of 10. Mr. Daue said he could only comment on his firm's experience and said he believes his firm probably has the highest volume of medical malpractice cases brought before the Medical Legal Panel of all the firms in Montana. He said bringing a malpractice claim is a very expensive proposition and not one that is entered into lightly by his firm, mostly due to expenses such as researching of medical records, expert witnesses, court reporters, depositions, and travel. Mr. Daue said the economics of a bad case become obvious very quickly.

REP. GOLIE asked if a claim is brought before the Medical Legal Panel and the Panel decides against the claim, how his firm decides if it will continue to pursue the claim. Mr. Daue said his firm does go forward in some cases in which the Panel has voted against the firm because ordinarily the Panel has very limited time and resources to conduct the kind of discovery necessary to make a solid determination of fact. If it is believed that with additional time and resources that additional facts will be found that will change the Panel's outcome, we will pursue those cases.

SEN. COBB asked how long it takes to settle an "average" case. Mr. Daue said most cases average of 18 months. SEN. COBB asked Mr. Daue if he thought it was possible to shorten that period. Mr. Daue said in cases where there is devastating injury or death, it takes at least 18 to 24 months to settle and nationally, that was not unusual. He said an alternative he would like to see is some collaborative means for doctors and hospitals and patients to get together outside the litigation setting and to resolve the matter by private agreement. Mr. Daue said sometimes patients just want to be heard and that they are not always looking for monetary compensation.

OTHER STAKEHOLDERS/ADDITIONAL TESTIMONY FROM HEALTHCARE PROVIDERS

Dr. Curtis Blake, Dillon, distributed and discussed three documents;

- a letter expressing his concerns about the cost of medical malpractice liability insurance (EXHIBIT # 12);
- a table listing malpractice premiums paid by Dr. Blake and his colleagues from 2001 through 2003, illustrating the escalating costs (EXHIBIT #13); and
- a recent article from the New England Journal of Medicine that addresses the medical malpractice issue (EXHIBIT #14).

Dr. Blake reported that he has also served as a panelist on the Medical Legal Panel: of the 8 cases he has heard, he felt only one case was truly a meritorious malpractice case and should have gone to trial. Dr. Blake said the remaining 7 cases had bad outcomes but that he could not say anyone was at fault. Dr. Blake closed by stating that 45% of the population of Beaverhead County lives at 200% or below of the poverty level and that 35% of his patients are charity cases. He said he has no expectation that he will ever receive payment from these patients and can't continue in this manner. He said he would either have to change his practice or move. Dr. Blake closed by saying he is very concerned that there will not be a general surgeon left in Montana if changes are not made soon.

REP. ROBERTS asked Dr. Blake if he has found that doctors in the surrounding area are less eager to help. Dr. Blake said that is the case and said there have been several instances in the past year when Butte surgeons have refused to treat his patients.

SEN. GRIMES said the Subcommittee has received contradictory information regarding the Montana Medical Legal Panel and asked Dr. Blake to further discuss his experience as a panelist. Dr. Blake said in his eight experiences as serving as a panelist, he had seen several cases he would classify as "fishing expeditions" but had not seen a case that he would classify as a flagrant abuse of the system. He recalled two cases in which the attorneys had not done a good job of investigating their cases and were not prepared. He said the remaining cases were simply bad outcomes and while there were questions, the Panel did not feel the cases constituted medical negligence.

SEN. GRIMES asked Dr. Blake to comment on what the effect might be if the Medical Legal Panel's decisions were made to be admissible or binding. Dr. Blake said he did not think making those changes would make a substantial difference.

REP. GOLIE said the Subcommittee has heard from many doctors that their malpractice rates were going up but that revenue was not increasing sufficiently to balance it out and asked Dr. Blake if that was true of his practice as well. Dr. Blake said he has experienced a 10% income reduction each of the last several years and said the decreases were not due entirely to the medical malpractice issue. He said other factors that contributed also and gave the example of decreased Medicare and Medicaid reimbursements.

REP. GOLIE asked if part of the revenue difficulties Dr. Blake is experiencing could be due to the fact that his practice is located in a sparsely populated and rural area. Dr. Blake said as a rural practitioner, there is a disproportionate number of uncovered or self-paying patients. He said a practitioner in a larger community, such as Missoula or Billings, would not be as impacted as much by this type of patient.

Dr. Kurt Kubicka, President, Montana Medical Association (MMA), submitted and read a letter from Montana Medical Association members (EXHIBIT #15) who wished to refute testimony presented by Mr. Gerald Neely to the Subcommittee at the November 17, 2003 meeting. Mr. Neely's November testimony addressed the reasons for the increases in medical malpractice rates. The letter read by Dr. Kubicka stated that Mr. Neely's remarks did not reflect the position of the MMA.

Dr. Frederick Kahn, Chairperson, Rocky Mountain Health Network Board (RMHN), Billings, submitted and discussed a letter also rebutting Mr. Neely's November testimony (EXHIBIT #16).

Dr. Kahn said the members of his organization wanted him to convey their opinion that, "if this crisis is left unaverted, we will not be able to do business as we have been over the last few years".

SEN. GRIMES asked Dr. Kahn to discuss arbitration or other options that may help avoid litigation or claims being filed. Dr. Kahn said RMHN is focusing on developing quality initiatives but was very reluctant to put names or numbers on a medical report form for fear of medical

discovery. RMHN would suggest that quality initiatives not be "discoverable" in order to allow doctors to analyze data to improve care without the fear of legal action.

REP. ROBERTS asked if rising malpractice rates are impairing the ability of medical residents in Billings to continue with their education. Dr. Kubicka said residents in Billings have reported difficulty in obtaining malpractice insurance. It is tied into a larger issue and that is the whole climate of fear: people are very fearful of lawsuits at every step of the system and that includes residents. If residents are lost, it will have major consequences for the care provided in all of eastern Montana.

REP. GOLIE said that "bad outcomes" had been discussed in previous testimony and said it was hard for him to understand a bad outcome when a doctor has taken the time to explain to the patient the risks involved with any proposed treatment plan and then have a lawsuit or claim filed against them anyway. Dr. Kahn said bad outcomes are a fact of life: a medical condition can be treated according to every guideline and a doctor can do everything perfectly but the mortality rate associated with any particular medical condition is still a factor. A doctor deals with it by thoroughly discussing the condition and treatment plan with the patient and reassuring them that every possible thing has been done. Dr. Kahn said no surgeon thinks that patients should not be compensated for an injury or for an outcome caused by negligence. He said what doctors want is "reasonable compensation" to the patient, not to the legal community, for these outcomes and to keep the frivolous suits out of the system.

REP. GOLIE said the Medical Legal Panel is supposed to discourage these frivolous lawsuits and asked Dr. Kahn if it is effective in its current design. Dr. Kahn said there is no data but it is his personal belief that it does provide some benefit. He said he has served both as a panelist and as a defendant and has seen patients' families come before the Panel simply to get an apology or to be heard. He said there are some totally frivolous cases and would recommend tweaking the Panel to discourage these cases by:

- requiring an attorney;
- requiring a certificate of merit; or
- making the decision binding or discoverable.

Dr. Kahn said the majority of physicians he has discussed this with think the Panel does have an impact.

SEN. GRIMES asked Dr. Kahn to give a personal view of how the tort climate affects the way he practices medicine. Dr. Kahn said the way he practices medicine has changed dramatically. He said doctors attempt to head off problems by careful documentation, thorough discussions of risks and medications, and by ordering tests that are purely for defensive purposes. Dr. Kahn said doctors are spending too much of their time going to legal seminars and reading articles about how to keep themselves out of court. He said it is getting more difficult to refer high risk patients to specialists for fear of lawsuits.

SEN. GRIMES asked if there are enough safeguards in place to prevent malpractice. Dr. Kahn said there a number of safeguards in place. He said medical staff bylaws allow for removal of physicians from staff for substandard care, but the safeguards could be further improved if the doctors weren't afraid to step forward and discuss safety. He said the fear that these discussions could be used in discovery prevent this from happening.

Pat Melby, General Counsel, Montana Medical Association (MMA), distributed a memo discussing suggested legislative actions for consideration by the SJR 32 Medical Malpractice Subcommittee (EXHIBIT #17). Discussed in the memo were:

- loss of chance doctrine;
- offset of personal consumption expenses;
- advance payments;
- common law third party bad faith;
- arbitration;
- attorney fees limitations;
- captain of ship;
- apology without admissibility;
- independent medical exam; and
- statutory informed consent.

Mr. Melby said the main purpose for testifying before the Subcommittee today was to defend himself and stated he took great offense to the first paragraph of Dr. Kahn's letter (EXHIBIT #16). He said the statement Dr. Kahn referred to in that paragraph was in response to a question asked by REP. GALVIN-HALCRO and was taken out of context.

Al Smith, Montana Trial Lawyers Association (MTLA), presented a letter to the Subcommittee which addressed several issues of concern to the MTLA (EXHIBIT #18) and urged the Subcommittee to make sure that the actions it takes will actually solve the problems. He said what is really needed is insurance industry reform. He said Montana should encourage captive insurance programs and that these programs would help ease market fluctuation. Mr. Smith suggested:

- looking at risk pooling as a potential solution;
- investigating insurance reform measures; and
- decrease incidences of preventable medical injuries.

Mr. Smith said tort reform, further limits on victim's awards, or limiting attorney fees would not provide the answers the Subcommittee was looking for.

Dr. Mark Wakaii, President, Rocky Mountain Health Network (RMHN), Billings, stated the reason he was appearing before the Subcommittee was to provide some information relative to Mr. Neely's testimony dated November 17, 2003. He distributed a document (EXHIBIT # 19) refuting Mr. Neely's testimony which discussed:

- a survey done of RMHN members to gather data on medical liability insurance premium rates;
- "excessive" liability limits and if they were a factor in the increased cost of liability insurance;
- carrier information and data on carrier changes made by physicians;
- gap or tail insurance impacts;
- claims information for RMHN members from 1999-2003; and
- data on specialty practices (EXHIBIT #20).

Dr. Wakaii concluded by saying the RMHN survey results are inconsistent with the MMA/Neely testimony given at the November 2003 meeting.

REP. ROBERTS said in a previous meeting it was pointed out that hospital rates are increasing dramatically, in addition to practitioner rates and asked if some hospitals providing specialty

services were a factor in the rising rates. Dr. Wakaii said the survey was only given to independent practitioners and that no hospital data was included.

Mike Foster, St. Vincent Healthcare, St. James Healthcare, & Holy Rosary Healthcare, submitted a letter from **Dr. Dennis Salsbury, Butte,** intended to clarify inaccuracies in Mr. Gerald Neely's November 2003, testimony, as perceived by Dr. Salsbury (EXHIBIT #21). Mr. Foster directed the Subcommittee's attention to the last page of the letter, which listed state-by-state data for insurance payments made to settle or satisfy judgments in a medical malpractice action for the years 1999-2001. Mr Foster pointed out that, according to the chart, Montana has the fourth highest claims per population rate in the nation.

Mr. Foster distributed a letter that **Dr. Lashman-Soriya, Billings,** received from Utah Medical Insurance Association explaining the 25% increase in medical malpractice insurance fees for 2004 (EXHIBIT #22).

Mr. Foster also distributed a number of recent publications, all of which address the medical liability crisis in America;

- *AN UNHEALTHY SYSTEM* published by The Center for Legal Policy at the Manhattan Institute (EXHIBIT #23), and
- a collection of articles published in the American Association of Neurological Surgeons Bulletin, Fall 2003 (EXHIBIT #24).

REP. GALVIN-HALCRO referred to an article in EXHIBIT #24 (*Restore Reliability to Medical Justice* by Nancy Udell, JD) and asked if the special medical court she wrote about would take the place of a district court or the Supreme Court in a medical malpractice suit. Mr. Foster said some states were experimenting with this concept to see if it would speed up the process and wasn't certain what role it would have in the system.

John Flink, Montana Hospital Association (MHA), stated the MHA would support all of the reform measures discussed through the day's meeting.

Mona Jamison, The Doctor's Company (TDC), made the following comments:

- the SJR 32 Study still has not researched the hospitals' liability crisis, is missing this segment of information, and it needs to focus specifically on hospital liability issues;
- TDC supports MMA's suggestions (EXHIBIT #17); and
- the "ostensible agency" issue must be addressed in Montana.

REP. GOLIE asked Dr. Wakaii and Dr. Kahn if they were of the opinion that insurance reform would result in lowering medical malpractice rates. Dr. Wakaii said he thought insurance issues did contribute to the problem and that some reform probably would help solve the problem. Dr. Kahn said in his opinion, insurance may be a small part of it but should focus on tort reform issues first, that insurance reform alone would not solve the problem.

COMMITTEE WORK SESSION

REP. GOLIE said he wanted to study the Wisconsin law information that was distributed prior to the meeting. He asked stakeholders to study it as well, to formulate an opinion of whether or not it would work in Montana, and to be prepared to substantiate their opinion with facts.

REP. ROBERTS said he would like to have Mr. Bohyer gather additional information and feedback on its effectiveness from Wisconsin stakeholders. He also said he thought the MMA suggestions should be implemented, rather than delayed because it would have an immediate effect on relationships between patients and practitioners and would help to ease the pernicious atmosphere that has been created by this issue.

SEN. COBB commented that he thought the Subcommittee could not do anything radical to lower the malpractice premiums because many of the factors at play are national issues. SEN. COBB suggested the Subcommittee list the issues that they did have the power to affect, such as tort reform, insurance reform, or alternative dispute resolution; and then vote to determine which issues will be addressed.

Dr. Kurt Kubicka, said the Montana Medical Association would like to discuss its ten legislative proposals (EXHIBIT #17) in more detail at the next meeting.

SEN. COBB asked Mr. Bohyer if the Subcommittee had to have its legislative proposals ready by June. Mr. Bohyer said under the current work plan, it did, but if the Subcommittee couldn't complete its work by then it could ask Legislative Council for additional resources and time.

REP. ROBERTS said the Subcommittee is very close to making decisions but that he would like more time to consider all of the information.

After discussion, the Subcommittee agreed they would like additional information on the Wisconsin laws. REP GOLIE said he would like the stakeholders to give their opinions on the Wisconsin law also.

REP. GOLIE suggested the Subcommittee come up with a list at this meeting, for discussion at the March meeting. SEN. COBB discussed a list he prepared which included all of the suggestions from the MA and other suggestions discussed at the meeting such as:

- whether MMLP decisions should be admissible and/or binding;
- the Good Samaritan law;
- the issue of ostensible agency;
- hedonic damages;
- risk pooling;
- insurance reform;
- nonmeritorious cases/frivolous lawsuits;
- Medicaid reimbursements; and
- a list of stakeholders actions what they are doing on their own right now and what can be done to help them (EXHIBIT #25).

SEN. GRIMES said he would like to add certificate of merit to the list for and the discoverability of quality initiatives.

Mr. Bohyer said he would organize the list with a brief description/definition of each item and distribute it to the Subcommittee members before the March meeting so all members would be ready for discussion at the March meeting. (*Mr. Bohyer formulated this list and sent it to all Subcommittee members in early February and for the purpose of these minutes, it will be referred to as EXHIBIT #26.)*

REP. BROWN said he envisioned that by the next meeting, the Subcommittee would have selected the issues it wants to move forward with, have serious discussion, choose two or three to pursue as committee bills, and instruct Mr. Bohyer to finalize these bills. He suggested a September meeting to go over the bills and make a final decision. He said he was confident the Legislative Council will extend the meeting schedule for this Subcommittee.

SEN. COBB asked members to call Mr. Bohyer with any additional suggestions or ideas. REP. GOLIE said he would like to be informed of any changes on the list also.

COMMITTEE ADMINISTRATION

The next meeting date of the SJR 32 Subcommittee is March 25, 2004, Helena.

Mr. Bohyer reported that the expense of bringing an actuary to Helena would have been minimum of $3000. He said he had discussed this with REP. GOLIE who decided this was a cost the Subcommittee could not incur. The Montana Hospital Association volunteered their actuaries to assist the Subcommittee and also asked if the Subcommittee could help offset expenses for bringing their actuaries to Montana. REP. GOLIE suggested an amount of $500 for expenses.

SEN. GRIMES asked if there was any precedent that the Subcommittee needed to be aware of. Mr. Bohyer said in the past, an honorarium had been provided in a few instances to out of state speakers. Mr. Brown, MHA, said it would be the pleasure of the Montana Hospital Association to pay all costs associated with bringing the actuary to the meeting.

ADJOURN

With no further business before it, the Subcommittee was adjourned at 6:30 p.m.

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